Supreme Court, U. S.
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MICHAEL RODAK, JR., CLERK

IN THE SUPREME COURT OF THE UNITED STATES

JANICE DUNCAN,
et al.,

Petitioners

Supreme Court No. 78-214

vs.

BRONDES FORD
SALES, INC.,
et al.,

Respondents.

BRIEF IN OPPOSITION TO
PETITION FOR WRIT OF CERTIORARI

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Now come the respondents and respectfully move this Court for an Order denying petitioners' Petition for Writ of Certiorari.

JURISDICTIONAL BASIS

The petitioners have based their claim for jurisdiction in this Court upon 28 U.S.C. Section 1257 (3), which reads in pertinent part:

> "Final judgments or decrees rendered by the highest court of a state in which a decision could be had, may be reviewed by the Supreme Court as follows:
>
> (3). . .or where any title, right, privilege or immunity is specially set up or claimed under the Constitution. . ."

We would agree with the petitioners that this section is properly invoked as to jurisdiction for this Court to consider a Petition for Writ of Certiorari in as much as it covers the entire range of federal questions which can arise in a state court action.

When, however, there are adequate state grounds upon which the state court based its decision then this Court should not exercise its jurisdiction. Respondents would submit that there are adequate and independent non-federal grounds in the case Sub Judice and therefore it is not a proper case for review in the Supreme Court.

STATEMENT OF THE CASE

This case involves a trial which was commenced in the Common Pleas Court of Lucas County, Ohio on March 30, 1977 and was terminated on March 31, 1977, involving a personal injury claim. After all parties rested upon their cases and upon due deliberation, the jury returned a verdict for the defendants on the issue that there was a failure of the plaintiffs to prove the requisite nexus between any negligence on the part of the defendants and the alleged injuries sustained by the plaintiffs

which may have been as a proximate result of such negligence.

The plaintiff-petitioners, herein, prosecuted an appeal to the Court of Appeals of Lucas County, Ohio, the Sixth District Court of Appeals, alleging seven assignments of error, only two of which addressed purported constitutional issues:

> "(5) Trial Court erred in excluding plaintiff's medical report . . .thus deprived plaintiffs of a right to fair trial and of equal protection of law, and
>
> (6) Trial Court deprived plaintiffs of equal protection by instructing jury on proximate cause in fact of admission."
> (See petitioners' Appendix V)

The Court of Appeals affirmed the trial court, with one judge dissenting in part but not upon the assignments set forth above.

Appeal was then taken by plaintiff-petitioners to the Ohio Supreme Court upon three propositions of law, as set out in

petitioners' Petition for Writ of Certiorari, at Appendix XVIII. The Supreme Court of Ohio, on May 11, 1978 dismissed the appeal for the reason that no substantial constitutional question existed therein, thus allowing to stand the jury verdict for the defendants.

ARGUMENT

I. The petitioners have come to this Court with five questions for consideration. Each purports to contain within it questions of federal dimension. If this Court were to accept this premise then it would find itself as the trier of fact in the case, requiring an in depth review of the trial court record.

Petitioners argue that whites represented by non-white counsel are denied due process of law, equal protection and do not receive fair and impartial trials. They have set forth cases with citations to the Toledo,Ohio Municipal Court and the Lucas County

Court of Common Pleas, among others, where white litigants represented by non-white counsel have not prevailed in the Ohio Courts. We will not take up the Court's time by providing citations of cases where white litigants represented by white attorneys or black litigants represented by black lawyers or black litigants represented by white lawyers have not prevailed in Ohio's judicial system, because as the system presently exists there is generally only one prevailing party.

Addressing the issue of the fairness of the trial, we would ask the Court to review the Sixth Circuit Court of Appeals' response to petitioners' then designated assignment of error number three, presented as "Calamity at the Courthouse" and assignment of error number four, "Perjured Testimony Frustrated Right to Fair and Impartial Trial", where the Court stated:

> "We find nothing in the record to sustain plaintiffs' allegations of a 'carnival-like atmosphere' and 'lying' by witnesses.
>
> Further we note that plaintiffs' liberal use of such words and phrases as 'calamity', 'fiat', 'tirades', 'hatchet man', 'outright lying', 'antics', squirms on the witness stand', 'seemy characters', 'liar', 'ruthlessness', etc. adds little to the substance to his arguments." (Petitioners' Appendix X)

Contrary to what the plaintiff-petitioners would have the Court believe, the trial below was at all times conducted in an orderly fashion with the trial judge ruling on all objections in conformity to the guidelines set forth in Ohio's statutes and rules governing courtroom procedures as to admissibility of evidence and courtroom decorum and procedure.

As it pertains to the petitioners' discussion of Ohio Rule of Civil Procedure 32 (A), we would respectfully ask the Court

to review subsection (A)(1) of Rule 32, and the annotations following it in 9 West's Ohio Practice, Rules of Civil Procedure Annotated, Civil Rule 32 (1970)

> "(A)(1) Any deposition may be used by any party for the purpose of contradicting or impeaching the testimony of deponent as witness."

See also Hoover v. State, 91 Ohio State 41, Al McCullough Transfer Co. v. Pizzulo, 53 Ohio App. 470, and 58 Am. Jur. Witnesses Section 767. Subsection (A) of Rule 32 only requires the filing of depositions with the court when the deposition is to be "read in evidence". In any case such a contention is in no way one of federal dimensions.

II. All of the foregoing discussion is presented only for clarification of the issues. We submit that there are adequate state grounds such as the Ohio Rules of Civil Procedure, which are wholly independent of any claimed federal question or ground

and which support the decision of the Ohio Supreme Court in its dismissal of petitioners' appeal as being without substantial federal question. See generally 62 Colum L. Rev. 822 (1962); Fox Film Corp. v. Muller, 296 U.S. 207 (1935).

Even in cases where both federal and non-federal questions are properly raised in the record, without admitting that to be the case here, but no opinion is delivered by the highest state court in rendering its judgment, we would argue that it has been the overall practice of this Court to presume that the decision of the state court was based upon a non-federal ground raised in the record which may be found adequate to grant it. Stern and Gressman, Supreme Court Practice, The Bureau of National Affairs, Inc., Washington, D.C. 1969, page 134.

Stern and Gressman also write that:

> "This presumption grows out of the principal that there must be some affirmative showing in the record that a federal question was presented to the state court and that a decision on such question was necessary to a determination of the cause. Where this is not clearly indicated, especially because of the presence of an adequate non-federal ground, jurisdiction will be declined." Id, at 134-135

See also Lynch v. New York ex rel Pierson, 293 U.S. 52, 54-55 (1934); and Woods v. Nierstheimer Warden, 328 U.S. 211 (1946).

CONCLUSION

Rule 19 1 (a) of the Rules of the Supreme Court of the United States is the codification of the discretionary boundaries which the Supreme Court will utilize in determining whether a case is one which should be heard on a Petition for Writ of Certiorari.

Rule 19 1 (a) reads:

> "1. A review on a writ of certiorari is not a matter of right, but of sound judicial discretion and will be granted only where there are special and important reasons therefore. The following, while neither controlling nor

fully measuring the Court's discretion, indicate the character of reasons which will be considered:

(a) Where a state court has decided a federal question of substance not theretofore determined by this court or has decided it in a way probably not in accord with applicable decisions of this court."

We submit that the questions presented by the petitioners are not "special" in the sense that they relate to problems beyond the acedemic or episodic and do no reach constitutional dimensions. Rice v. Sioux City Memorial Park Cemetery, 349 U.S. 70 (1954). Further, we submit, that the Ohio Supreme Court has not decided a federal question of substance not previously determined by this court, or not in accord with applicable decisions of this Court.

On this basis we respectfully request that the Court deny petitioners' Petition for Writ of Certiorari.

Respectfully submitted:

David M. Schnorf

CERTIFICATE OF SERVICE

I hereby certify that copies of the Brief in Opposition to Petition for Writ of Certiorari were mailed by ordinary U.S. mail to George Hopkins, III, Attorney at Law, 1202 Junction Avenue, Toledo, Ohio 43607 and to R. Jesse Brown, Suite 107 Capital Towers, Jackson, Mississippi 39150.

David M. Schnorf